

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY  
AND THE HUMAN RIGHTS COMMISSION  
STATE OF MONTANA

In the matter of the amendment of ARM	)	NOTICE OF AMENDMENT,
24.8.101, 24.8.103, 24.8.105, 24.8.201,	)	AMENDMENT AND TRANSFER,
24.8.203, 24.8.205, 24.8.207, 24.8.210,	)	ADOPTION, AND REPEAL
24.8.212, 24.8.216, 24.8.220, 24.8.301,	)	
24.8.401, 24.8.403, 24.8.410, 24.9.101,	)	
24.9.102, 24.9.103, 24.9.104, 24.9.105,	)	
the amendment and transfer of ARM	)	
24.9.1701, 24.9.1703, 24.9.1704,	)	
24.9.1705, 24.9.1711, 24.9.1712,	)	
24.9.1714, 24.9.1717, and 24.9.1718, the	)	
adoption of NEW RULES I through XXIII,	)	
and the repeal of ARM 24.8.405, 24.9.107,	)	
24.9.210, 24.9.212, 24.9.213, 24.9.218,	)	
24.9.219, 24.9.220, 24.9.221, 24.9.222,	)	
24.9.223, 24.9.224, 24.9.225, 24.9.226,	)	
24.9.230, 24.9.231, 24.9.261, 24.9.262A,	)	
24.9.263, 24.9.264, 24.9.265, 24.9.301,	)	
24.9.302, 24.9.303, 24.9.304, 24.9.305,	)	
24.9.306, 24.9.307, 24.9.308, 24.9.309,	)	
24.9.310, 24.9.311, 24.9.312, 24.9.314,	)	
24.9.316, 24.9.317, 24.9.318, 24.9.319,	)	
24.9.320, 24.9.321, 24.9.322, 24.9.323,	)	
24.9.324, 24.9.325, 24.9.326, 24.9.327,	)	
24.9.328, 24.9.401, 24.9.402, 24.9.403,	)	
24.9.404, 24.9.405, 24.9.406, 24.9.407,	)	
24.9.409, 24.9.410, 24.9.411, 24.9.412,	)	
24.9.414, and 24.9.1719 pertaining to	)	
allegations of unlawful discrimination	)	

TO: All Concerned Persons

1. On October 9, 2008, the Department of Labor and Industry (department) published MAR Notice No. 24-8-232 regarding the proposed amendment, amendment and transfer, adoption, and repeal of the above-stated rules at page 2091 of the 2008 Montana Administrative Register, Issue Number 19.

2. On October 30, 2008, the department held a public hearing in Helena at which time members of the public made oral and written comments and submitted documents. Additional comments were received during the comment period.

3. The department has thoroughly considered the comments and testimony received from the public. The following is a summary of the public comments received and the department's response to those comments:

Comment 1: One commenter recommended a clarification to the proposed amendment to Rule 24.8.103(7). It is the commenter's position that the determination is not a final determination and should be defined as a fact-finding proceeding.

Response 1: There is no definition for "contested case" proceeding in the existing administrative rules. The definition has been added to clarify the use of the term "contested case" for the new administrative rules that will govern the processing of a complaint that proceeds to a "contested case" proceeding before the Hearings Bureau. See NEW RULES I through XXIII. The Hearings Bureau's contested case hearing serves a broader purpose than merely "fact-finding". At the contested case hearing the parties develop the record and the decision that is issued does establish the "legal rights, duties and privileges of the parties." The Hearings Bureau's decision is subject to appeal to the Human Rights Commission and ultimately to a District Court on a petition for judicial review. Findings of fact and conclusions of law in the contested case are binding unless a party can establish error via the respective standards of review. See ARM 24.9.1717 and 2-4-702, MCA.

Comment 2: One commenter questioned why the language regarding the "termination of jurisdiction" in proposed amendments to ARM 24.8.103(12) has been deleted.

Response 2: The use of the term jurisdiction in the existing ARM 24.8.103(12) is not accurate. The department has been given statutory jurisdiction over complaints of discrimination that have been filed under Title 49, chapters 2 and 3, MCA, as well as several federal laws pursuant to a work-sharing agreement with the Equal Employment Opportunity Commission. A party's exhaustion of the administrative process does change or alter the department's jurisdiction.

Comment 3: One commenter noted that the proposed amendments to ARM 24.8.205 appear to permit the Human Rights Bureau to advise charging parties generally, when the Human Rights Bureau should be limited to advising charging parties on the filing of a complaint.

Response 3: The department receives approximately over 5,000 phone calls in a year. The bulk of these calls have nothing to do with an actionable claim of discrimination. For example, a person may call wanting to file a complaint of discrimination on the grounds that she was terminated because her supervisor did not like her and she wants to know how to file for Unemployment Insurance benefits. It is the department's position that as a government agency the Human Rights Bureau has an obligation to serve the public. The language of the rule should not limit the department from providing a caller with objective and neutral information on any topic. Of those 5,000 calls, it should be noted that only 500 to 600 result in the filing of a complaint. Further, it should be noted that the department also provides objective and neutral information to persons responding to complaints of discrimination.

Comment 4: One commenter noted that the service by regular mail under proposed ARM 24.8.207(1) is not adequate notice. Further, the commenter noted that if certifying mail is an undue expense then the Human Rights Bureau should provide an acknowledgment form to verify receipt. The commenter suggested that then in the absence of verification, send the complaint by certified mail.

Response 4: The controlling statute only states that the department must notify the Respondent of a complaint. See 49-2-504(3), MCA. It is the department's position that the formality of certified mail or personal service is not necessary at this stage of the proceedings because the complaint is not actually pending before an adjudicative forum. (The function of the informal investigation is to ascertain whether there is "reasonable cause" to believe that a preponderance of the evidence supports the charge.) Since the formal service requirements of the Rules of Civil Procedure do not apply, service by regular mail sufficiently accomplishes the goal of advising the Respondent that a complaint has been filed and that the Human Rights Bureau will begin conducting its informal investigation. During the course of the informal investigation, a Respondent will be given the opportunity (and is expected to) respond to the charges set forth in the complaint.

Comment 5: One commenter stated that neither the existing rule nor the proposed amendments to ARM 24.8.210 provides adequate protection for third-party participants. For example, it is not uncommon for an employer to provide the Human Rights Bureau with comparative information for third-party employees (e.g., counseling reports, disciplinary actions). It is the commenter's position that an informal procedure, short of a hearing, needs to be established for handling this information.

Response 5: The statutory language is clear that if requested, the department shall provide the parties with all other information related to the complaint in the possession of the department that is not currently in the possession of the parties or a party. See 49-2-504(3), MCA. Further, the department shall make known to the parties the fact that information is available upon request. *Id.* Whenever either party provides information to the Human Rights Bureau and wishes to assert a privacy interest in that information, the investigator places this information in a segregated portion of the investigator's file and this information is not released pending exhaustion of the process set forth in ARM 24.8.210. Of course, either party is free to provide the investigator with both a redacted copy and a nonredacted copy of any information the party believes should be held in confidence. If a party does this, the redacted copy of the information will be released (if requested) and may satisfy the request without the need for additional proceedings.

The commenter's point is well taken and it is the intention of the department to continue to refine the process regarding the release of information, including a rule that would allow the Hearings Bureau to issue protective orders.

Comment 6: One commenter noted that the "any and all" and "none" language in the proposed amendments to ARM 24.8.220(1)(a) and (b) needs to be deleted on the grounds that a charging party should be required to prove all of the elements of a claim of a discrimination by a preponderance of the evidence.

Response 6: The language of the controlling statute states that if there is a finding of discrimination, the complaint will be certified for hearing. Since the information gathered by the investigator during the course of the informal investigation is considered hearsay, the only thing that travels up to the Hearings Bureau on a "cause" finding is the complaint itself. At this stage, the parties are afforded the opportunity, under the Rules of Civil Procedure and the Rules of Evidence, to prove and defend all of the allegations in the complaint. Additionally, it would run afoul of notions of judicial economy if the Human Rights Bureau issued both "no cause" and "cause" findings for a single complaint. The charging party would have to pursue - and a respondent would have to defend - in two forums, both a district court and an administrative forum.

Comment 7: One commenter contended that a charging party's failure to cooperate in an investigation, under proposed ARM 24.8.403, should remain grounds for dismissal.

Response 7: This change conforms to amendments to the statute.

4. The department has amended ARM 24.8.101, 24.8.103, 24.8.105, 24.8.201, 24.8.203, 24.8.205, 24.8.207, 24.8.210, 24.8.212, 24.8.216, 24.8.220, 24.8.301, 24.8.401, 24.8.403, 24.8.410, 24.9.101, 24.9.102, 24.9.103, 24.9.104, and 24.9.105 exactly as proposed.

5. The department has amended and transferred ARM 24.9.1701 (24.9.109), 24.9.1703 (24.9.111), 24.9.1704 (24.9.113), 24.9.1705 (24.9.115), 24.9.1711 (24.9.117), 24.9.1712 (24.9.119), 24.9.1714 (24.9.121), 24.9.1717 (24.9.123), and 24.9.1718 (24.9.125) exactly as proposed.

6. The department has adopted NEW RULE I (24.8.701), NEW RULE II (24.8.704), NEW RULE III (24.8.707), NEW RULE IV (24.8.710), NEW RULE V (24.8.713), NEW RULE VI (24.8.716), NEW RULE VII (24.8.719), NEW RULE VIII (24.8.722), NEW RULE IX (24.8.725), NEW RULE X (24.8.728), NEW RULE XI (24.8.731), NEW RULE XII (24.8.734), NEW RULE XIII (24.8.737), NEW RULE XIV (24.8.740), NEW RULE XV (24.8.743), NEW RULE XVI (24.8.746), NEW RULE XVII (24.8.749), NEW RULE XVIII (24.8.752), NEW RULE XIX (24.8.755), NEW RULE XX (24.8.758), NEW RULE XXI (24.8.761), NEW RULE XXII (24.8.764), and NEW RULE XXIII (24.8.767) exactly as proposed.

7. The department has repealed ARM 24.8.405, 24.9.107, 24.9.210, 24.9.212, 24.9.213, 24.9.218, 24.9.219, 24.9.220, 24.9.221, 24.9.222, 24.9.223, 24.9.224, 24.9.225, 24.9.226, 24.9.230, 24.9.231, 24.9.261, 24.9.262A, 24.9.263, 24.9.264, 24.9.265, 24.9.301, 24.9.302, 24.9.303, 24.9.304, 24.9.305, 24.9.306,

24.9.307, 24.9.308, 24.9.309, 24.9.310, 24.9.311, 24.9.312, 24.9.314, 24.9.316, 24.9.317, 24.9.318, 24.9.319, 24.9.320, 24.9.321, 24.9.322, 24.9.323, 24.9.324, 24.9.325, 24.9.326, 24.9.327, 24.9.328, 24.9.401, 24.9.402, 24.9.403, 24.9.404, 24.9.405, 24.9.406, 24.9.407, 24.9.409, 24.9.410, 24.9.411, 24.9.412, 24.9.414, and 24.9.1719 as proposed.

/s/ MARK CADWALLADER

Mark Cadwallader  
Alternate Rule Reviewer

/s/ KEITH KELLY

Keith Kelly, Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

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/s/ RYAN RUSCHE

Ryan Rusche, Chair  
Human Rights Commission

Certified to the Secretary of State on December 15, 2008.